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Anusha Aurasu Aspalella A. Rahman

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Money laundering and civil forfeiture regime: Malaysian experience

Anusha Aurasu
Centre for Pre-University Studies, Tunku Abdul Rahman University College, Kuala Lumpur, Malaysia, and
Aspalella A. Rahman
School of Law, Universiti Utara Malaysia, Alor Star, Malaysia

Abstract

Purpose – Money laundering is a complex issue which has been ongoing for many years globally. Developed and developing countries form anti-money laundering regime in the view to combat these ever-challenging criminal activities. Laundering of money involves the hiding and cleaning of "dirty money" derived from unlawful activities. Malaysia has come up with its own regime of anti-money laundering. Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA) provides power to forfeit proceeds at the end of proceedings. This paper aims to investigate whether the current civil forfeiture regime in Malaysia is effective in fighting against money laundering.

Design/methodology/approach – This paper will be based on a doctrinal research where reliance will mainly be on relevant case laws and legislations. AMLATFA is the primary legislation which will be utilised for the purpose of analysis.

Findings – Despite the enactment of AMLATFA, little study has been carried out on the effectiveness of civil forfeiture regime under Malaysian anti-money laundering laws. Furthering into forfeiture of criminal proceeds, the findings show that forfeiture provisions are the recent law enforcement strategy to fight against crimes. It is implicit that this strategy is more efficient than the conventional approach, which only focused on punishing the individual criminal but failed to diminish the criminal operations as a whole.

Originality/value – Strengths and weaknesses of AMLATFA are identified where it is less comprehensive in terms of offences covered and standard of proof. With that, this paper analyses the civil forfeiture regime under the Malaysian anti-money laundering laws. This paper would also offer some guiding principles for academics, banks, their legal advisers, practitioners and policymakers, not only in Malaysia but also elsewhere. Anti-money laundering laws can further be improved by being a better and established civil forfeiture regime where Malaysia will be able to discharge its duties well on forfeiting benefits from criminals.

Keywords Malaysia, Money laundering, Civil forfeiture, AMLATFA, Criminal proceeds

Paper type Research paper

Introduction

Money laundering is regarded as a form of crime, whereby it facilitates criminals in having the benefit of hiding the proceeds without being traced and prosecuted. As such, money laundering is, indeed, a process where criminals use a variety of methods in legalising "dirty money" which has been obtained from illegal activities, and those methods involve financial, accounting and legal tools. Money laundering is typically

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carried out through banks and financial institutions, insurance companies, lawyers, accountants, offshore banks and lottery companies (Mohamed and Ahmad, 2012).

For a long time, the matter of money laundering has been drawn towards proceeds of crime. In this sense, proceeds of crime can simply be put as money earned from profit-oriented crime. The methods used are many and highly complicated. Technological tools accord further chances for individuals to use money laundering as a process of "cleaning up" dirty money and obscure the trail leading back to the underlying crime. Therefore, as the battle against preventing money laundering targets at a more effective enforcement of criminal law in relation to criminal proceeds, it is useful to observe that one of the main legal tools that are used to fight against money laundering is forfeiture of criminal proceeds.

The need to forfeit proceeds of a crime is now considered as one of the necessary means to deprive money launderers of illegal profits. Although the origins of criminal proceeds were often from drug trafficking, many law enforcers have now shifted their focus to offences such as human trafficking, cyber-crime, illegal arms sales and smuggling. Developed and developing countries like the UK, Australia, the USA, Malaysia, Singapore and Switzerland have given their recognition to forfeiture laws, and it is seen to be part of effective law enforcement relating to criminal proceeds from money laundering-based activities.

There are two underlying principles which are noticeable under the anti-money laundering regime in every jurisdiction, and they include, on the one hand, punishment for those who have committed crime relating to money laundering and, on the other hand, depriving the benefits gained from illegal activities. It is strongly succumbed that with these objectives of anti-money laundering, the finance of criminal organisations can be weakened, and hence, the reduction of criminal cases involving laundering of money can be observed.

Following the preceding explanations, this paper focuses primarily on the examination of civil forfeiture of criminal proceeds by making an analysis on relevant provisions under the Anti-Money Laundering and Anti-Terrorism Financing Act (AMLATFA, 2001).

Combating money laundering under AMLATFA

Malaysia has moved towards forming an effective anti-money laundering regime, and AMLA was first enacted in 2001, where the FATF 40 Recommendations[1] were codified (MIA, 2005). With this Act coming into force in 2002, Malaysia has taken its first move in criminalising money laundering as well as giving recognition for banking secrecy.

With high regards given to the FATF 9 Recommendations[2], the Malaysian AMLA was amended in 2003 and renamed as AMLATFA (2001). This was undertaken to include combating instruments against terrorist financing, which was part of the 9 Recommendations. AMLATFA comprises instruments such as the investigation of money laundering and terrorism financing offences as well as the freezing, seizure and forfeiture of criminal proceeds (MIA, 2005).

The main objectives of AMLATFA are:

- endow with offence for money laundering;
- measures for fighting against money laundering as well as terrorist financing; and

- provide for forfeiture of property and proceeds derived from money laundering and terrorist financing.

AMLATFA has 93 sections, divided into seven parts, namely, Part 1: preliminary; Part 2: money laundering offences; Part 3: financial intelligence; Part 4: reporting obligation; Part 5: investigation; Part 6: freezing, seizure and forfeiture; Part 6A: suppression of terrorism financing offences and freezing, seizure and forfeiture of terrorist property; and, last but not least, Part 7: miscellaneous (AMLATFA, 2001).

Forfeiture of criminal proceeds

Money laundering-related activities call for all enforcers around the world to spend their time and energy to track down the proceeds of serious crime (Kennedy, 2007). This is reasoned as proceeds are shifting swiftly from one place to another (Nikolov, 2011). Therefore, to do so, effective and right tools have to be engaged to recuperate proceeds from unlawful activity and, hence, take away all benefits from the offenders (Smellie, 2005). This is where forfeiture comes in as an instrument to trail the proceeds (Cassella, 2008).

In layman's term, according to *Oxford Advanced Learner's Dictionary of Current English*, forfeiture is defined as "the act of taking away something". Focusing into legal meaning of forfeiture, it is the act of depriving one's benefits obtained through illicit acts (AMLATFA, 2001).

Forfeiture of criminal proceeds is generally divided into criminal and civil. The nature of how these two types of forfeiture work differs from one another. In this manner, criminal forfeiture of proceeds involves an order that is imposed in a criminal case where the suspect is convicted based on evidence that proceeds of crime have been benefitted from an illicit activity or to pay a fine and deprive those proceeds of crime or property utilised or purchased using those proceeds (Cassella, 2008).

Criminal forfeiture is also similar to confiscation order in some jurisdiction. It is an order *in personam*, not in proprietary. In other words, the charges will be against the person who was involved in the illicit activity (Cassella, 2008). For example, in a criminal forfeiture of proceeds, if the defendant laundered any amount of money through a legal activity and purchased properties, it is then understandable that the court may order to forfeit the legal activity

In contrast, civil forfeiture carries the similar objectives, namely, to deprive one's benefit of having the criminal proceeds as well as the property used to carry out the so-called "legal activity" (Kennedy, 2006). The procedure of court for criminal and civil is different. Here, the burden and standard of proof for criminal and civil forfeiture are usually as follows:

(1) Criminal forfeiture:
   - burden of proof – prosecution; and
   - standard of proof – beyond a reasonable doubt.

(2) Civil forfeiture:
   - burden of proof – prosecution; and
   - standard of proof – on the balance of probabilities but slightly higher burden for a civil order in a criminal case.

Distinct from criminal forfeiture, which entails that a person be convicted of an offence before his or her property is confiscated, it is noted that civil forfeiture amounts to a lawsuit filed directly against a possession, regardless of its owner's guilt or innocence (Stillman, 2013). There are a few situations where civil forfeiture is appropriate and they include (Cassella, 2008):

- Uncontested forfeiture claim.
- The defendant is dead.
- The suspect is not known.
- Third-party intervention.
- A case where the situation does not call for criminal conviction, i.e. minor cases involving laundering of money.
- The wrongdoer is convicted in another country but the property is elsewhere.

Part VI of AMLATFA involves instruments available for law enforcers when circumstances call for forfeiting of property or criminal proceeds. Any person who engages in, or attempts to engage in, or abets the commission of, money laundering, commits an offence and shall, on conviction, be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both (AMLATFA, 2001, s. 4).

In *Public Prosecutor* v. *Thong Kian Oon & 4Ors* [2012] 5 AMR 444, there was an order of forfeiture of the properties that were seized from the respondents. Except for the first two respondents, it is noted that the other respondents were not arrested for any offence under the Act. In support of the application, it was asserted that the properties were the subject matter of or were used in the commission of an offence under section 4 of AMLATFA. It was further contended that the respondents had been involved in illegal public lottery and that the properties were proceeds of an unlawful activity under section 4A (1) of the Emergency Ordinance (Prevention of Crime and Public Order) 1969 ("the Ordinance").

The issues raised in the case were whether those offence(s) are referred to in the Second Schedule to the Act and whether the properties sought to be forfeited are the subject matter of a serious offence as contemplated by the Act as well as on the issue of sufficiency of evidence.

The Court dismissed the application and, hence, ordered to return the properties. It was stated that as a forfeiture application is a serious matter and the owner stands to lose property because the property was the subject matter of the offence of section 4(1) of AMLATFA, the applicant has to set out clearly the case that the owner is called to answer. In this instance, there was no reasonable proof from the applicant as to which offence was being relied on for the purpose of the forfeiture application.

The properties claimed by the applicant as being proceeds of unlawful activity under section 4 A (1) of the Emergency Ordinance (Prevention of Crime and Public Order) 1969 are not a subject matter of a serious offence. There was insufficient evidence to show that the properties are the subject matter of or were used in the commission of an offence under section 4(1) of the Act.

Civil forfeiture provisions under AMLATFA

Looking at provisions relating to civil forfeiture in Malaysia, section 56 in its original form can be seen as follows (AMLATFA, 2001, s. 56):

> 56. (1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.
>
> (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied –
>
> (a) that the property is the subject matter of or was used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property; and
>
> (b) that there is no purchaser in good faith for valuable consideration in respect of the property.
>
> (3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.
>
> (4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

From the above, it is observed that the court may make an order if it is convinced that the property was purchased using proceeds from money laundering or used during the undertakings of money laundering activities (AMLATFA, 2001, ss. 56, 61, 70).

On that note, section 56 of AMLATFA can be deemed as a useful section. The section allows the court to forfeit criminal proceeds from money laundering activities, even though there is no conviction under criminal division. This is called as civil forfeiture of criminal proceeds and it is a new regime in Malaysia. Civil forfeiture is a regime where there is a significant and essential role to be played by directing at the property itself even without any convictions. Technicality problem of section 56 of AMLATFA, such as the time limit for forfeiture proceedings, has been raised in the case of *Public Prosecutor* v. *Dragcom Sdn Bhd & Ors and other applications* [2013] 5 MLJ 594.

The above case involves three applications made by the public prosecutor under section 56 (1) of AMLATFA. The common ground of the applications was that in all three cases, the monies in question had been obtained as a result of or in connection with a money laundering offence under section 4(1)(a) of AMLATFA.

In this case, the respondents in all the three cases were investigated for a smuggling offence under section 135 of the Customs Act 1967. The issue that was raised to the court was whether the court had jurisdiction to entertain an application under section 56 (1) of AMLATFA if it was filed 12 months or more after the seizure or freezing order. The prosecution put forth an argument that the court had the inherent power not to strike out an application on a technicality such as delay. Furthermore, it was contended that the AMLATFA did not provide that an application under section 56 should be struck out if it was made outside the stipulated 12 months from the date of seizure or delay.

The court dismissed the application on the basis that the word "may" in section 56(1) of the AMLA was used in the sense that it was up to the public prosecutor to apply for forfeiture. In other words, the use of the word "may" referred to the general discretionary power of the public prosecutor to proceed with forfeiture proceedings or to return the property. Assuming "may" was interpreted to mean that the public prosecutor had the

discretion to make the forfeiture application 12 months after the seizure or the freezing order, the time stipulation would be rendered utterly meaningless.

Similarly, in the case of *Public Prosecutor* v. *Liew Teng Shuan* [2012] 10 MLJ 167, the issue was on whether the prosecution was outside the 12-month period for initiating criminal proceedings against the accused under section 56 of AMLATFA. The case involves freezing of the assets of Lim Teng Shuan (the accused), namely, his bank accounts ("the freezing order"). The monies in the bank accounts had been obtained as a result of the accused committing an offence under section 4(1) of the AMLATFA. The accused was to be tried jointly for the four offences.

The accused argued that section 56 (1) of the AMLATFA to be read together with section 56 (3), provided that where there was no "prosecution" or "conviction" for an offence under section 4 (1) of the AMLATFA before the expiration of 12 months from the date of the freezing order, the assets seized under the freezing order should be released to the person from whom it was seized.

The prosecution appealed against the order of the Sessions Court judge (SCJ) for the unfreezing of frozen assets. The prosecution also applied for a revision of the SCJ's order for the discharge not amounting to an acquittal of the accused from the charge. The Appeal Court allowed the appeal on the basis that the prosecutor's application was within the 12-month period. It was found that the criminal proceedings were in fact instituted when the Sessions Court had received the complaint from the prosecutor and issued a warrant of arrest on 4 June 2009. By issuing the warrant of arrest on 4 June 2009, the court was seized with jurisdiction to try the case, and as a result, the institution of the proceedings by the prosecutor was complete.

It is observed from the above case that the time limit for forfeiture application under section 56 (1) of AMLATFA should be construed in a strict manner. The 12 months' time limit may be insufficient, as the situation can be complex. However, as the word "may" has been included, it is undeniable that some strict interpretation has to be considered by the courts on whether to allow prosecutors to apply for forfeiture application even after 12 months.

AMLATFA provides the bona fide third parties' rights and the standard of proof (AMLATFA, 2001, s. 56). Nonetheless, overall, when it comes to money laundering or terrorism financing offences, AMLATFA still requires the prosecutor to apply criminal standard of proof.

Here, in particular, subsection 4 provides that [AMLATFA, 2001, s. 61(4)]:

> The court or enforcement agency shall return the property to the claimant when it is satisfied that –
>
> (a) the claimant has a legitimate legal interest in the property;
>
> (b) no participation, collusion or involvement with respect to the offence under subsection 4(1) or a terrorism financing offence which is the object of the proceedings can be imputed to the claimant;
>
> (c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;
>
> (d) the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and

(e) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

Under section 61(4) of AMLATFA, third parties can make their claims with notice. The burden of proof is on the claimant, and here, he or she has to prove that he or she has a legitimate interest in the property, no participation in the money laundering activities, lack of knowledge of the illicit use of the property and the claimant did everything that he or she could to put a stop to the illegality of the property.

Under subsection 2, however, the notice by third parties should be gazetted to show the reason(s) on why the property should not be forfeited. For example, in *Public Prosecutor* v. *Raja Noor Asma bt Raja Harun* [2013] 9 MLJ 181, the respondent was charged with 50 counts for the offence under section 4(1) (a) AMLATFA. A third-party notice was gazetted under sections 55 and 61 of the AMLATFA to inform any bona fide third party with interest to be present in the court to show cause as to why the properties valued at more than RM 8m that were seized could not be forfeited to the Government of Malaysia.

About 700 third parties who were the investors in the Fx Capital Company belonging to the respondent were present in the Sessions Court to claim the properties which were gazetted. The parties had agreed that about eight investors would testify representing the 700 investors. The SCJ decided that the investors were bona fide third-party claimants and ordered that all the properties be returned to them. Not satisfied with the SCJ's decision, the prosecution filed this appeal.

The prosecution contended that section 61 of the AMLATFA does not provide for a procedure to prove that the claimants were bona fide third-party claimants, and thus, the court had the discretionary power to determine the procedure by itself. Moreover, section 61 did not provide any obstruction or was wrong in law against any procedure which was admissible by the court in determining the bona fide third parties' claim against the properties gazetted.

The prosecution had further contended that the SCJ had erred in law and facts in deciding that the third-party respondents were bona fide third-party claimants in their application and were entitled to recover the monies that they had deposited when there was no evidence adduced to support the decision. The investors were said to have failed to prove all the matters provided under paras (a) to (e) of s 61(4) of the AMLATFA when it was proven that all the monies were obtained from illegal activities when the respondent pleaded guilty and convicted for all the charges preferred.

On the facts, a sum of RM 1,372,359 of ill-gotten monies had been laundered and RM 1m from that sum had been admittedly expended by the appellant. There was, therefore, no merit in the appellant's plea that he had not benefitted from the offence. It mattered not that no criminal breach of trust was involved in the commission of the offence. A charge for a money laundering offence can, at the instance of the Public Prosecutor, be an unconnected allegation as a person may be charged, as in this case, quite independent of there being a charge for a predicate offence against him. In the circumstances, there was no reason why the offence committed by the appellant should or ought not to be caught squarely by the penalty provisions, imprisonment included, as contained under s 4(1) of the Act.

One difficulty that the courts may face in invoking section 61 of AMLATFA is that if one may point out the contrary to what some officials said, claims under this section are not automatic and certainly are not based on first-come, first-served basis. A notice need

to be published in a gazette first, where it will call upon a third party to show cause as to why the property shall not be forfeited.

A bona fide third party has to satisfy all circumstances under section 61 of AMLATFA and it is read conjunctively. This poses a challenge to the third party, as it may not be as easy as it may seem. Courts should assess all evidence thoroughly, and if there is connection between the third party and the said illegal criminal property, he or she should be allowed to claim the property. However, interpreting the term "good faith" may be difficult, and here, it can be said that each case should be dealt on its own facts, as interpretation of "good faith" can be deemed to be subjective.

In addition, it is essential to take note that in determining the estimation of value in relation to criminal proceeds, section 59 of AMLATFA gives powers to enforcers to recover the amount of benefits obtained from illicit activities and this is called a pecuniary penalty order (PPO). However, this provision is a standalone provision, and there are other provisions on forfeiture of criminal proceeds under AMLATFA as supra.

Conclusion

AMLATFA, in general, accommodates reasonable mechanisms for forfeiture of criminal proceeds under sections 55, 56, 59 and 61 of AMLATFA. By using AMLATFA, criminal proceeds from money laundering can be recovered, and here, provisions under AMLATFA do provide law enforcers comprehensive means to do so.

With the introduction of civil forfeiture regime, enforcers should consider of applying for it when involving crimes relating to money laundering. This can be taken into account to lessen the burden of proving the case through criminal division, which is clear and convincing on balance of probabilities instead of beyond a reasonable doubt. Civil forfeiture is indeed an important tool, which ensures that wrongful gains do not stay with the criminals.

Other benefit includes courts are able to proceed in the non-appearance of a defendant. Here, a court is likely to be satisfied and willing to proceed so long as the defendant has been properly served notice of the proceedings.

Succinctly, it is apparent that the AMLATFA does provide both civil and criminal forfeiture of criminal proceeds. Both have their own strengths and weaknesses in terms of offences covered and standard of proof. However, as civil forfeiture is a new regime under AMLATFA, enforcement agencies in Malaysia do not readily use this type of forfeiture. This is due to the nature of civil forfeiture, where it is viewed as archaic and inadequate in granting appropriate protections to property holders. It is completely a new power for enforcement agencies, and lack of procedural guidelines contributes to higher probability of abuse of power.

Notes

1. The FATF 40 Recommendations have been recognised by the International Monetary Fund and the World Bank as the international standards for combating money laundering and the financing of terrorism. 40 Recommendations first adopted in 1990, revised in 1996 and 2003.
2. 9 Special Recommendations first adopted in 2001 where it is a set of countermeasures against money laundering and the financing of terrorism, covering the required legal, regulatory and operational measures.

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Corresponding author

Anusha Aurasu can be contacted at: anushaa@acd.tarc.edu.my